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IN THE

Supreme Court of the United States

October Term, 1967.

No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI.

B. NATHANIEL RICHTER,
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I.

STATEMENT.

In 1955 petitioners' decedent purchased round trip air passage from Philadelphia to San Salvador and return. All parties agree that his flight was governed by the Warsaw Convention. His air ticket contained only the following illegibly printed, reference to the Warsaw Convention:

> "Carriage/Transportation under this Passenger Ticket and Baggage Check hereinafter called 'ticket' is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules Relating to International Carriage/Transportation by Air signed at Warsaw October 12, 1929, if such carriage/transportation is 'international carriage/transportation' as defined by said Convention."[1]

The last and fatal leg of his round trip was made on a flight originating in Miami and destined for Philadelphia. The plane crashed at the airport in Jacksonville, Florida, killing decedent and all others on board. After an extraordinary history of litigation in which a jury originally and justifiably concluded that the plane crashed as the result of a deliberate attempt to land under a fog in violation of Federal flight regulations, a 2-1 decision in the Court of Appeals for the Third Circuit eventually affirmed a judgment in favor of respondent air line.

A Petition for a Writ of Certiorari was filed, October Term 1967, No. 528, to review the judgment below. On March 25, 1968, that Petition was denied under circumstances and with consequences which, we respectfully submit, warrant the grant of this Petition.

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1. Despite respondent's suggestions to the contrary, the tickets —which appear as Appendix B to the Petition for Certiorari—appear in the record. Respondent offered them into evidence and described them accurately as "the tickets" (760a-762a of the trial record).

II.

THIS COURT'S REFUSAL TO GRANT CERTIORARI CLEARLY AND ERRONEOUSLY RESULTED FROM THE 4-4 VOTE IN ALITALIA-LINEE AEREE ITALIANE, S. P. A. v. LISI, ET AL.

A. A Grant of Certiorari Could Not Result in Affirming the Judgment of the Court of Appeals for the Third Circuit Even if This Court Remained Evenly Split Because the Court of Appeals Refused to Decide the Crucial Ticket Issue.

On March 25, 1968, this Court affirmed *Alitalia-Linee Aeree Italiane, S. P. A. v. Lisi*, October Term 1967, No. 70, by an equally divided court. Mr. Justice Marshall did not participate. As Solicitor General, he was on the Memorandum for the United States as *Amicus Curiae* in that case. On the same day that *Lisi* was decided here, the case at bar was denied certiorari. Mr. Justice Marshall did not participate in our case either. In view of Solicitor General Griswold's earlier suggestion that this case should abide the outcome in *Lisi*, and in view of the simultaneity of decisions in both cases here, it is clear that this Court recognized that the two cases share a common and decisive question, the Warsaw ticket issue.

Because of Mr. Justice Marshall's abstention in *Lisi*, there was an evenly split vote on *Lisi's* merits. The equal division had the effect of affirming the decision of the Court of Appeals for the Second Circuit, a decision which held the *Lisi* ticket legally inadequate under the Warsaw Convention. In refusing to grant certiorari in *Berguido*, this Court must have reasoned that despite the fact that four Justices would necessarily hold the ticket in *Berguido* inadequate, the grant of certiorari would only eventuate in an equally divided Court and therefore an affirmance in *Berguido* would create the following grotesque result.

In *Lisi* an equal division affirmed a holding that the ticket was legally inadequate. But in *Berguido* an equal division would apparently affirm a holding that an *even more* defective ticket is legally adequate. Therefore this Court must have denied certiorari here to avoid both the appearance and substance of different results on the same important question.

This Court's apparent concern was groundless, and here is the error which must be corrected by a grant of this petition and of certiorari: unlike *Lisi,* an equally divided vote on the ticket issue here would not and could not be an affirmance of the Third Circuit's holding on the adequacy of the *Berguido* ticket because the Court of Appeals below expressly refused to decide that very issue. No combination of votes in this Court can affirm what has never been decided below.

This is how the majority of the Court of Appeals for the Third Circuit refused to decide the crucial Warsaw ticket issue:

> "The District Court . . . as well as finding that appellee was not guilty of wilful misconduct, found that appellee was not even negligent. If this conclusion is supportable, it is final and there is no need for us to examine appellant's legal contentions concerning Article 3(1) of the Convention [which specifies the requirements of a Warsaw ticket] . . ."[2]

As the majority opinion below demonstrates, the ticket issue was never decided in this case despite our submission of the ticket issue below and despite our briefing and oral argument upon it there. Petitioners are entitled to have that issue decided.

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2. *Berguido v. Eastern Air Lines, Inc.,* 369 F. 2d 874, 879 (C. A. 3, 1966). 36 *U. S. Law Week* 3373 (3/26/68) is other confirmation that the ticket issue was not decided below.

In view of the fact that the pivotal ticket issue is still not adjudicated, the grant of certiorari and a decision on the merits here would be neither an exercise in futility nor the prelude to a contradictory result when compared with *Lisi*.

Petitioners could not know of the even division of this Court in the *Lisi* case until after the decision. Therefore they could not know of the "controlling effect" of the "intervening circumstance" of Mr. Justice Marshall's refusal to sit in *Berguido* until after the decision in *Lisi*. This petition for a rehearing in all its aspects therefore meets the requirement of Rule 58, paragraph 2 of this Court.

B. The Delivery of an Inadequate Ticket Imposes Absolute Liability on the Carrier Under the Warsaw Convention.

The ticket in *Lisi* and the ticket here are indistinguishable save that the ticket here was both less legible and said even less about the limitations of the Warsaw Convention than the ticket in *Lisi*. Both cases, therefore, put the same question: were these tickets adequate to satisfy the requirements of the Warsaw Convention? This Court proceeded as if it intended to follow Solicitor General Griswold's recommendation to let the disposition of *Berguido* turn on the outcome in *Lisi*. The Court clearly followed his recommendation, for although it disposed of many other petitions for certiorari filed after *Berguido's*, it withheld decision on our petition until the day *Lisi* was decided. On that day, despite the Court's obvious recognition of the identity of issues between *Lisi* and *Berguido*, it also denied our petition for certiorari. We believe that it was the Court's concern for the consequences of an equal division in *Lisi* which led to the denial of certiorari in the case at bar.

If burgeoning appellate litigation[3] on the Warsaw ticket issue proves anything, it proves what we unsuccessfully argued below: A Warsaw case cannot be adjudicated without resolving the ticket issue. Upon the resolution of that issue depends the entire question of the rights of the parties to Warsaw litigation. That is why the first Warsaw case ever heard by this Court involved the ticket issue. It is also why so many of this Court's questions in the oral argument of *Lisi* were concerned with the effect of a legally inadequate ticket.

To make a judicial determination of how the Warsaw Convention operates in any case, there must be a determination of whether a ticket is adequate. But rather than do what *Lisi* now demonstrates must be done, the lower court here expressly refused to decide that very issue. Instead, it forced upon the Convention an interpretation which destroyed petitioners' rights by treating the ticket question as though it did not matter at all in the absence of a plaintiff's proof of the carrier's fault. That is manifest error. The Warsaw Convention allows of no such construction. If a ticket is inadequate, considerations of negligence or wilful misconduct are completely irrelevant. The Solicitor General agrees.[4]

Whether or not a ticket is adequate is the indispensable key to whether or not a carrier may invoke the extraordinary defenses created by the Convention. If the ticket is inadequate, we submit that the language of the Convention is pellucid: the carrier is denied all its Warsaw defenses and issues of negligence, wilful misconduct or any other species of fault are irrelevant. Yet it was exactly on the alleged absence of negligence or wilful misconduct that the petitioners' rights were destroyed below.

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3. See, for example, *Egan v. Kollsman Instrument Corp.*, 21 N. Y. 2d 160, 234 N. E. 2d 199 (1967).

4. Solicitor General's Memorandum for the United States as *Amicus Curiae* herein.

We believe that the language and the history of Article 3(2) justify our view of the Convention. The Solicitor General, too, agrees that the lower court's view of Warsaw is wrong. Before the rising tide of Warsaw litigation further burdens the trial and appellate courts of the nation, we deeply believe this Court ought to say just that. It ought to say it here, for this case raises the issue of Warsaw interpretation decisively.

III.

MR. JUSTICE MARSHALL SHOULD PARTICIPATE IN THE CONSIDERATION OF THIS CASE AND ALL ITS ASPECTS.

It is apparent that Mr. Justice Marshall did not participate in *Lisi* because, on May 15, 1967, while he was Solicitor General of the United States, this Court invited him to offer his views on the propriety of granting certiorari in that case. 387 U. S. 901. Before he resigned as Solicitor General a brief *Amicus Curiae* in that case was in fact prepared. Since he had thus participated as counsel in *Lisi*, 28 U. S. C. § 455 disqualified him from participation in that case as a judge.

The same consideration does not apply to the present case. The Court did not request the views of the Solicitor General in this case until November 13, 1967, 88 S. Ct. 333, after Mr. Justice Marshall had become a member of the Court. Therefore he was not disqualified by 28 U. S. C. § 455.

A number of cases have held that a judge has the duty to sit when no valid reason exists for his disqualification. This duty is every bit as strong as the duty to refuse to sit when he is disqualified: e.g., *United States v. Hoffa*, 382 F. 2d 856, 861 (C. A. 6, 1967); *Edwards v. United States*, 334 F. 2d 360, 362-3 (C. A. 5, 1964); *In re Union Leader Corp.*,

292 F. 2d 381, 391 (C. A. 1, 1961). The most cogent statement of this important policy was made by Judge Rives in the *Edwards* case, *supra,* at 334 F. 2d 362:

> "After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that, under the law, I have no choice in this case.
>
> "It is a judge's duty to refuse to sit when he is disqualified but *it is equally his duty to sit when there is no valid reason for recusation.* Banco Nacional de Cuba v. Sabbatino, 2d Cir. 1962, 307 F. 2d 845, 860, reversed on the merits by Supreme Court on March 23, 1964, 376 U. S. 398 . . .; United States v. Valenti, D. C. N. J. 1954, 120 F. Supp. 80, 92; 48 C. J. S. Judges § 93a. If a party is dissatisfied and makes timely objection, a judge's decision to refuse to act on a case is subject to review. Medlin v. Taylor, 1893, 101 Ala. 239, 13 So. 310; 48 C. J. S. Judges 893b. The only two statutes on disqualification which I found are §§ 47 and 455 of Title 28, United States Code, neither of which would appear to have any application to my situation." [Emphasis supplied.]

Under these principles, we respectfully submit that Mr. Justice Marshall had a duty not to disqualify himself when his only reason was the fact that the present case raised the same issue as the *Lisi* case.

There is no legal basis for a judge to disqualify himself in one case simply because, as a lawyer, he had taken a position in brief in another unrelated case on the same legal issue—as Mr. Justice Marshall did in the *Lisi* case. See *McGrath v. Kristensen,* 340 U. S. 162, 176 (1950) where Mr. Justice Jackson took part in deciding an issue on which he

had expressed an opinion as Attorney General, and *In re Nevitt,* 117 Fed. 448, 452 (C. A. 8, 1902). The issue is particularly acute when the legal position was taken by the Solicitor General of the United States pursuant to the Court's request for his views as a friend of the Court.

The problems raised by Mr. Justice Marshall's failure to participate in the disposition of this petition for certiorari could not become known until the order in question was raised. Therefore, the grounds for this petition satisfy both criteria for a petition for rehearing set forth in this Court's Rule 58, paragraph 2.

We respectfully believe that Mr. Justice Marshall should have participated in the decision here. But even if that conclusion is erroneous, we are convinced that what must have been the Court's rationale for denying certiorari here was also its fundamental error. As this cause presently stands, the error has completely destroyed the rights which petitioners have struggled for more than a decade to vindicate through their unique ordeal of litigation.

The alternative to deciding the ticket issue here was clearly suggested by Solicitor General Griswold in this case. The Court followed the form of his suggestion by letting *Berguido* abide *Lisi's* outcome. It now ought to follow the substance as well. In his *Amicus Curiae* memorandum, Solicitor General Griswold proposed that: "If the Court agrees with the Second Circuit's conclusions in *Lisi* [now affirmed by a divided Court], it would appear appropriate to remand the instant case for reconsideration in light of that decision . . .". As a minimal relief, we respectfully submit this ought to be done on a remand which commands the Court of Appeals for the Third Circuit to decide the issue of the adequacy of the ticket in this case.

There would be no reason whatsoever for Mr. Justice Marshall to disqualify himself on this issue for he would not be deciding the adequacy of the ticket but merely decid-

ing whether the Court of Appeals should be ordered to decide the adequacy of ticket.

Finality in litigation is a good only so long as it is not purchased with the coin of an unjust result. *Gondeck v. Pan American World Airways, Inc.*, 382 U. S. 25, 86 S. Ct. 153 (1965). There is absolutely no justification for having the ticket in *Lisi* and the ticket here yield different results except for the seemingly potential embarrassment which might arise from an evenly split decision in each case. But as we have shown, that possibility does not in reality exist here because neither an equal division nor any other distribution of votes here can affirm what had to be—but never was—decided below.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58, Paragraph 2 of the Rules of this Court.

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Counsel for Petitioners.